

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
The Family Garden)
APL-008-07) **Decision**

This Decision is in response to an appeal (APL-008-07) of a partial denial of National Organic Program (NOP) certification to The Family Garden, by Quality Certification Services (QCS), for a portion of the operation deemed not in compliance with the Organic Foods Production Act of 1990 (Act)¹ and the regulations promulgated thereunder.²

BACKGROUND

The Act authorizes the Secretary to accredit certifying agents to certify crop, livestock, and handling operations to the National Organic Standards (7 CFR Part 205). Certifying agents also initiate compliance actions to enforce program requirements. Noncompliance procedures are set forth in Section 205.662 of the NOP regulations. Persons subject to the Act who believe that they are adversely affected by a noncompliance decision of a certifying agent may appeal such decision to the Administrator pursuant to Section 205.680 of the NOP regulations.

¹ 7 U.S.C. 6501-6522

² 7 C.F.R. Part 205

FINDINGS OF FACT

- 1) Quality Certification Services (QCS), Gainesville, FL, was granted USDA accreditation on April 29, 2002, for the certification of crop, livestock, wild crop and handling operations.
- 2) Jordan Brown, sole proprietor of The Family Garden, Gainesville, FL, submitted an application to QCS on January 8, 2007, requesting NOP certification of a 10 acre crop production operation located in Bell, Florida.³
- 3) According to Mr. Brown, he spread 1300 lbs. of Nature Safe 8-5-5 fertilizer on field 2A, a ½ acre parcel, on December 22, 2006, which was followed by the planting of sweet onions on December 25-26, 2006, that were intended for organic certification. Mr. Brown had noticed blue particles in the fertilizer and after planting he contacted Mr. Gabe Diaz-Saavedra, South East Regional Manager, Nature Safe, for identification of the substance.⁴
- 4) Mr. Diaz-Saavedra stated in an email, dated January 2, 2007, to Ramkrishnan Balasubramanian, Program Director, QCS, that he visited Mr. Brown on December 29, 2006, to collect a sample of the fertilizer. Mr. Diaz-Saavedra reported that Mr. Brown had contacted him on December 26 or 27, 2006, having observed “blue specs” in the Nature Safe 8-5-5 fertilizer of which Mr. Brown had purchased (b) (4) 50 lb bags. Griffin Industries determined that the fertilizer sample

³ Certification was also requested for a ¼ acre seed starting parcel in Gainesville, Florida.

⁴ Nature Safe 8-5-5 Agriculture Fertilizer is formulated by Griffin Industries, Cold Spring, KY. The Nature Safe 8-5-5 product spec describes this product as, “Organic Farming Fertilizer with 4.5% Calcium,” and further states, “Nature Safe 8-5-5 Landscape Fertilizer is an OMRI listed product and allowed under NOP guidelines validating the use in the production of organic certified crops.” According to the product spec, the nutrient sources in the product are meat meal, hydrolyzed feather meal, bone meal, blood meal and sulfate of potash. The Organic Materials Review Institute (OMRI), conducts independent reviews of products intended for use in certified organic production, handling and processing. Products which per OMRI determination are acceptable for use in NOP certified operations are designated as such on the OMRI Products List. According to the OMRI Products List, updated on March 6, 2007, Nature Safe 8-5-5 is “allowed.”

collected by Mr. Diaz-Saavedra contained U-Flexx, a synthetic urea used in another Griffin Industries fertilizer blend that is sold to the lawn care and golf industries. Mr. Diaz-Saavedra estimated that U-Flexx comprised ¼ lb, or .00019% of the total 1,300 lb quantity of Nature Safe 8-5-5 applied by Mr. Brown.⁵

- 5) On January 16, 2007, Mr. Rick Geise, Director of Marketing/Brand Manager, Griffin Industries/Nature Safe Fertilizers, wrote to Mark Bradley, Associate Deputy Administrator, NOP, to explain that the Nature Safe 8-5-5 had been contaminated and to plead on behalf of Mr. Brown that the area to which the fertilizer was applied be approved for organic certification. According to Mr. Geise, the Nature Safe manufacturing facility follows a “flushing” procedure after production with U-Flexx. He explained that a small amount of the U-Flexx had adhered to metal on the internal blending equipment due to high external temperatures and humidity, and the internal random sampling had failed to detect the presence of any U-Flexx material in the Nature Safe 8-5-5. Mr. Geise asserted that the presence of the U-Flexx should not adversely impact Mr. Brown’s request for organic certification as: (i) the amount of the material applied was minimal and quickly dissolves in the presence of water leaving no physical traces, (ii) the presence of the U-Flexx would not affect the fertility value of the product, soil structure or crops; (iii) the operator bears no responsibility for the incident, and (iv) failure to grant certification would discourage other producers from reporting the presence of an unknown material.

⁵U-Flexx is manufactured by AGROTAIN International, LLC, Corydon, KY. According to the Material Safety Data Sheet, U-Flexx contains Dicyandiamide, NBPT (N-(n-Butyl)-thiophosphoric triamide) and other trace impurities and solvents. An AGROTAIN U-Flexx fact sheet states that the product contains a stabilizer to minimize nitrogen loss to the atmosphere, allowing time for transport to the root zone.

- 6) Mr. Bradley forwarded a copy of Mr. Geise's letter to Mr. Balasubramanian with the reminder that the operator be notified of the right to appeal if QCS decided not to grant certification for the parcel to which the Nature Safe 8-5-5 was applied.
- 7) On January 24, 2007, Matt Vargas, QCS Certification Coordinator, issued a Notice of Noncompliance and Denial of Certification to The Family Garden for the portion of the operation including field 2A. The notice stated that the application of Nature Safe 8-5-5, Lot #0126, which contained the accidental presence of synthetic urea is inconsistent with §205.601, and consequently any crop harvested within 36 months from the date of the fertilizer application could not be certified organic as per §205.202(b).^{6 7}
- 8) On February 9, 2007, Mr. Brown filed an appeal of the denial of certification with the Administrator of the Agricultural Marketing Service. Mr. Brown stated that prior to the Nature Safe 8-5-5 application he consulted the OMRI Products List to confirm that this product was acceptable for use in organic production. He recounted that in spreading Nature Safe 8-5-5 on December 22, 2006, he noticed the blue particles, but mindful of the OMRI listing and having rechecked the label, he planted sweet onions prior to contacting the fertilizer salesman about blue substance. Mr. Brown appealed the denial of certification on the basis that the application was completely inadvertent and resulted in the application of only

⁶ §205.601 is a section within the National List of Allowed and Prohibited Substances which identifies synthetic substances allowed for use in organic crop production. §205.202 "Any field or farm parcels from which harvested crops are intended to be sold, labeled, or represented as "organic," must: ... (b) Have had no prohibited substances, as listed in §205.105, applied to it for a period of 3 years immediately preceding harvest of the crop...." §205.105 "To be sold or labeled as "100 percent organic," "organic," or "made with organic (specified ingredients or food groups(s))," the product must be produced and handled without the use of (a) Synthetic substances and ingredients, except as provided in §205.601 or §205.603."

⁷ Matt Vargas inspected the remainder of The Family Garden operation on January 24, 2007. In a memorandum dated January 24, 2007, Mr. Vargas documented that adverse action proceedings had been initiated with respect to a portion of the operation, but that this did not impact the remainder of the operation. On February 5, 2007, QCS issued NOP certification to The Family Garden for 9 ½ acres of crop production.

a small amount of a prohibited substance that contaminated an otherwise NOP-compliant product.

DISCUSSION

The appellant spread the fertilizer, Nature Safe 8-5-5, on a ½ acre portion of his crop operation, having correctly determined that the product was acceptable for use in organic production. After the fertilizer application and subsequent planting of sweet onions, the appellant contacted the manufacturer about the presence of blue pellets which he had observed in the fertilizer. The manufacturer analyzed a sample of the fertilizer and determined that the blue material was synthetic urea, a residual amount of which had adhered to processing equipment and was not removed before the production run of the fertilizer that was subsequently purchased by the appellant. Thus, the certifying agent denied certification to the ½ acre portion of the operation on which the operator spread the contaminated fertilizer.

The appellant asserted that denial of certification is not appropriate because the prohibited substance was applied inadvertently and involved an extremely small quantity. The fertilizer manufacturer supported that position claiming responsibility for the product adulteration and characterizing the effect of the prohibited material as benign and not persistent.

CONCLUSIONS

The certifying agent properly used its authority to deny certification to that portion of the operation from which a crop intended for certification would be harvested within 36 months of the application of a prohibited substance, synthetic urea. However, exceptional circumstances in this case impel the Agency to exercise discretion in modifying the adverse action. Two sources provide evidence of regulatory intent to

permit exceptions to the land requirements in 205.202(b), when the operator, adhering to an acceptable organic system plan, is unable to avert contamination of the operation.

The U.S. Senate Report of the Committee on Agriculture, Nutrition and Forestry, states, “On occasion, organic farmers, although following the strict standards in this bill, may produce products with minimum residues due to inadvertent environmental contamination such as drift from a neighboring farm...The Committee does not intend to prohibit minimal residue contamination that does not result from practices used by the organic farming operation.”⁸ Furthermore, the NOP Preamble indicates that a compliant operation should not be penalized for the unintentional incorporation of excluded methods or products of excluded methods. “As long as an organic operation has not used excluded methods and takes reasonable steps to avoid contact with the products of excluded methods as detailed in their approved organic system plan, the unintentional presence of the products of excluded methods should not affect the status of an organic product or operation.”⁹

The above comments are applicable to this appeal case as the means of contamination exceeded the reasonable expectation of the operator’s ability to prevent such introduction. A deviation from the restriction which would be levied upon a finding of intentional contamination with a prohibited substance or lack of sufficient preventive measures is justified, provided that the exception does not imperil the organic integrity of any product. Therefore, the sweet onions planted nearly simultaneously with the fertilizer application, on December 25-26, 2006, in field 2A, may not be sold, labeled or marketed as organic. However, as the prohibited substance is recognized as a nutrient rather than a toxin and that its presence in a portion of this operation was inadvertent, a certifying

⁸ Sen. Comm. on Agriculture, Nutrition and Forestry, *Food, Agriculture, Conservation and Trade Act of 1990*, Sen. Comm. Print. 101-357 (July, 1990).

⁹ 65 Fed Reg. 80556. December 21, 2000.

agent may certify a subsequent crop planted field 2A provided that all other regulatory provisions are met.

DECISION

The appeal is sustained with regards to restoration of the eligibility of the land to be certified, but delays that potential certification until harvest of the current crop is complete.

Done at Washington, D.C., on this 18th_
day of ____April_____, 2007.

Lloyd C. Day
AMS Administrator